

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

ANTHONY LAMAR EVANS,

Movant

v.

CIVIL ACTION NO. 2:05-0711
(Criminal No. 2:99-00126-02)

UNITED STATES OF AMERICA,

Respondent

MEMORANDUM OPINION AND ORDER

Pending are movant Anthony Lamar Evans' motions (1) pursuant to 28 U.S.C. § 2255, filed August 18, 2005, and (2) for appointment of counsel, filed June 7, 2006.

I.

Movant seeks the vacatur, set aside, or correction of his sentence of 188 months imposed following his conviction at trial of violating 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Movant was acquitted on two additional counts. On July 27, 2004, movant's direct appeal was decided adversely to him. United States v. Evans, No. 03-4860 (4th Cir. Jul. 27, 2004). Just a little over one month earlier, on June 24, 2004, the Supreme Court handed down its landmark decision in Blakely v. Washington, 542 U.S. 296 (2004). Movant's lawyer filed a timely petition for

rehearing, relying upon Blakely. The court of appeals denied the motion on September 8, 2004, and the mandate issued September 16, 2004. Movant's lawyer moved to withdraw on September 28, 2004, after erroneously advising his client that the due date for a timely petition for certiorari was October 26, 2004, when it would instead have been December 15, 2004, ninety days after the petition for rehearing was denied and the mandate issued. The lawyer's motion to withdraw was granted November 10, 2004. It appears that the movant was not advised that the withdrawal was granted.

The court received the proposed findings and recommendation of the United States Magistrate Judge, filed on May 26, 2006, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B). On June 7, 2006, movant objected and moved for counsel to be appointed. The government has not objected.

The magistrate judge has very carefully addressed the posture of the case and movant's contentions. The proposed findings and recommendation urge relief be denied as to the first and second grounds found in the movant's motion. Although the movant objects to that recommendation, the magistrate judge has adequately, and correctly, resolved the matter.

The magistrate judge further recommends relief be granted as to the remaining grounds. No objection has been lodged to that portion of the recommendation. Following a de novo review of the matter, and based upon the proposed findings and recommendation of the magistrate judge, which are hereby adopted and incorporated herein, the court concludes that grounds three and four are meritorious, but only insofar as they result in the vacatur of his sentence and his re-sentencing in light of United States v. Booker, 543 U.S. 220 (2005). The court, accordingly, ORDERS as follows:

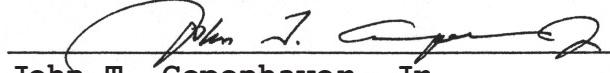
1. That movant's motion be, and it hereby is, granted as to grounds three and four, in the limited fashion so stated in the foregoing paragraph, and denied as to its residue;
2. That the sentence imposed upon the movant be, and it hereby is, vacated. The movant will remain in the custody of the Bureau of Prisons pending further proceedings and re-sentencing;
3. That the movant's motion for appointment of counsel for re-sentencing be, and it hereby is, granted;

4. That the panel administrator be, and she hereby is, directed to facilitate the appointment of counsel for the movant in the customary fashion employed in this district;
5. That the United States Probation Officer be, and he hereby is, directed to prepare a revised presentence report for distribution to counsel no later than August 21, 2006;
6. That the parties be, and they hereby are, directed to submit their objections to the revised presentence report no later than 14 days after receipt of the revised presentence report;
7. That the probation officer be, and he hereby is, directed to submit the final revised presentence report to the court no later than 7 days prior to sentencing; and
8. That a re-sentencing hearing be, and it hereby is, scheduled for October 26, 2006, at 1:30 p.m.

The court will enter final judgment on the section 2255 motion at the time the movant is re-sentenced.

The Clerk is directed to forward copies of this written opinion and order to (1) the United States Magistrate Judge, (2) the United States Probation Officer, (3) Phillip H. Wright, Criminal Division Chief, United States Attorney's Office, (4) the panel administrator, for transmission to the lawyer ultimately appointed to represent movant, (5) the United States Marshal, and (6) the movant personally at his present place of incarceration.

ENTER: June 23, 2006


John T. Copenhaver, Jr.
United States District Judge